Office-Supreme Court, U.S.
FILED
MAY 14 1963
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962.

No. [redacted] 126

CHESAPEAKE & OHIO RAILWAY COMPANY,
AND THE ERIE RAILROAD CO.,
*Petitioners,*

*vs.*

LOIS BRAY VERA CRUZ,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RUSSEL J. WILDMAN,
1½ South Broadway Street,
Peru, Indiana,
*Counsel of Record for Petitioner Chesapeake & Ohio Railway Company,*

STANLEY A. TWEEDLE,
5217 Hohman Avenue,
Hammond, Indiana,
*Counsel of Record for Petitioner The Erie Railroad Co.*

THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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*To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:*

The Chesapeake & Ohio Railway and The Erie Railroad Co. pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above cause on January 10, 1963. A petition for a rehearing was denied on February 13, 1963, without opinion.

## OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit (Judge Schnackenberg dissenting) is reported as:

> *Lois Bray Vera Cruz* v. *Chesapeake & Ohio Railroad and The Erie Railroad Co.* (C. A. 7, 1963), 312 F. 2d 330.

A copy of the opinion and order is appended to this petition in the Appendix at page 4a.

The opinion and order of the United States District Court for the Northern District of Indiana is appended to this petition in the Appendix at page 1a.

## GROUNDS FOR INVOKING THIS COURT'S JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was made and entered on January 10, 1963 (Appendix 8a). Petitioners' petition for a rehearing was denied on February 13, 1963 (Appendix 12a).

The statutory provision believed to confer jurisdiction to review the judgment in question is Title 28 U. S. C., Section 1254(1), and reads:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

It is here noted that Respondent (plaintiff below) appealed to the Court of Appeals *in forma pauperis.* The complete *original* record was therefore ordered certified up to this Court by order of the Court of Appeals dated February 28, 1963. Inasmuch as there is therefore no printed transcript all citations are to the original record.

## QUESTIONS PRESENTED FOR REVIEW.

Respondent filed an action against Petitioners in the United States District Court for the Northern District of Indiana, Hammond Division, seeking damages for injuries sustained in an accident in which an engine operated by the Chesapeake and Ohio Railway Company, over the tracks of The Erie Railroad Co., was in a collision with an automobile at an intersection of the tracks and a public street in Hammond, Indiana. Respondent was a passenger in the automobile.

The jury returned a money verdict in favor of respondent and answered interrogatories. Petitioners filed a motion, under Rule 50(b), for a judgment n.o.v. in accordance with their previous motion for a directed verdict together with a motion, under Rule 49(b), for a judgment on the interrogatories n.o.v., and also filed a timely motion for a new trial in the alternative as provided by Rule 50(b), Federal Rules of Civil Procedure (Record 197 to 201).

The District Court heard oral argument on Petitioners' motion for a judgment n.o.v. and for a new trial in the alternative; briefs were submitted, and Petitioners' motions taken under advisement. Thereafter the District Court granted Petitioners' motion for a judgment n.o.v. but did not rule on Petitioners' motion for a new trial in the alternative (Appendix 3a).

The District Court handed down its opinion and order by mailing a copy of the order and opinion to counsel for Petitioners in the evening of the day the order was entered. The Trial Judge then left Hammond, Indiana early the next morning for Chicago, Illinois where he was sworn in as a Judge of the Court of Appeals for the Seventh Circuit. Neither Petitioners nor their counsel were in Court at the time of the entry of the opinion and order of the Trial

Judge, and immediately upon receipt of the opinion and order counsel for Petitioners went to the Office of the District Court in Hammond, Indiana to request a ruling on the motion for a new trial in the alternative, and found the Trial Judge had already left for Chicago, Illinois to be sworn in as a Judge of the Court of Appeals for the Seventh Circuit (See affidavit of Petitioners' counsel appended to this petition in Appendix at page 9a).

Respondent appealed to the Court of Appeals for the Seventh Circuit. That Court held the District Court erred in granting a judgment n.o.v., and remanded with directions to vacate the judgment notwithstanding the verdict and to enter judgment on the general verdict for plaintiff, *but failed to direct the trial court to rule on the pending motion for new trial.*

Petitioners' motion for a new trial and the many serious legal questions presented thereby were not presented to the Court of Appeals in the Respondent's appeal from the judgment of the District Court by brief or in any other manner.

*The opinion of the Court of Appeals deprived the Petitioners of having the merits of their motion for a new trial decided, either by the District Court or by the Court of Appeals.*

The questions here presented are:

1. Whether the Court of Appeals has authority to deprive Petitioners of a ruling on their motion for a new trial, timely filed, orally argued, and briefed.

2. Whether the Court of Appeals erred in ordering the District Court to enter judgment on the general verdict without the Court first ruling on Petitioners' motion for a new trial.

3. Whether the Court of Appeals erred in failing to

order the District Court to consider and rule on Petitioners' motion for a new trial after entering judgment on the general verdict.

4. Whether (a) under the record, and (b) whether in the absence of any evidence whatsoever, the Court of Appeals has a right to speculate that "On this record the District Court *might*, with justification, *assume* that the appellees had abandoned the motion". (Our emphasis.)

5. Does "justice" require that Petitioners forfeit all legal rights to which they are entitled under their motion for new trial without ever having had a ruling thereon?

6. The failure to have an adjudication upon the motion for new trial deprived Petitioners of their rights to due process under the 5th Amendment to the Constitution of the United States.

**CONSTITUTIONAL PROVISIONS, RULES, ETC. INVOLVED.**

No statute, Federal or State, is involved in the present petition.

Directly involved, however, is Rule 50(b) of the Federal Rules of Civil Procedure (post-verdict motions). The Rule reads:

> Rule 50 * * * "(b) **Reservation of Decision on Motion.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, *a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict*; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accord-

ance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, *or a new trial may be prayed for in the alternative.* If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and *either order a new trial or direct the entry of judgment* as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial." (Our emphasis.)

The Court's denial to Petitioners of their day in court on their pending motion for new trial involves a deprevation of their constitutional rights under that part of the *Fifth Amendment* to the Constitution of the United States, reading:

> "No person shall * * * be deprived of life, liberty, or *property*, without *due process* of law; * * *"

## CONCISE STATEMENT OF THE CASE.

Federal jurisdiction was obtained in the District Court by reason of diversity of citizenship and the amount involved exceeding $10,000.00.

The Chesapeake and Ohio Railway Company was operating one of its trains over tracks owned and maintained by The Erie Railroad Co., in the City of Hammond, Indiana. While proceeding to the southeast, across a four-lane street known as 165th Street, the engine collided with a Volkswagen being driven to the west on said street. Respondent was an occupant of the Volkswagen, and was injured in the collision.

Respondent sought damages for personal injuries and trial was to a jury. The jury returned a verdict against Petitioners in the amount of $25,000.00 and answered interrogatories submitted to them by the Court.

Petitioners filed a timely motion for a judgment on the answers to the interrogatories n.o.v. and a motion for judgment n.o.v. on their motion for a directed verdict under Rule 50(b) together with a motion for a new trial in the alternative. Petitioners' motion for a judgment n.o.v. and Petitioners' motion for a new trial in the alternative were orally argued before the District Court, and briefs were submitted, after which the District Court took both motions under advisement.

Thereafter, the Trial Judge granted Petitioners' motion for a judgment n.o.v. but entered no ruling on petitioners' motion for a new trial in the alternative. The order was entered late in the day, without notice to any of the parties. The parties were notified of the entry of such order by a copy thereof deposited in the United States Mail late in the day on which the order was entered and was not received by Petitioners until the day after it was entered.

Immediately, upon receipt of a copy of such order, counsel for Petitioners went to the Office of the District Court to prevail upon the Trial Judge to rule on Petitioners' motion for a new trial, and found the Trial Judge had already left for Chicago, Illinois where he was sworn in that day as a Judge of the Court of Appeals for the Seventh Circuit. *At no time did Respondent make any effort whatsoever to obtain a ruling on the motion for new trial.*

Respondent appealed and the Court of Appeals for the Seventh Circuit (one judge dissenting) held the District Court erred in granting judgment n.o.v. for the reason that in the majority's opinion the special interrogatories and the general verdict were harmonious. It further mandated the District Court to enter judgment on the verdict of the jury in favor of the plaintiff *and deprived Petitioners of*

*their historic right to have the District Court rule on their pending motion for new trial.*

Petitioners filed a Petition for Rehearing raising this point which was denied February 13, 1963, without opinion.

## REASONS FOR GRANTING THE WRIT.

1. The action of the Court of Appeals in directing entry of judgment for Respondent and denying Petitioners of a ruling on their timely motion for a new trial is inconsistent with the Federal Rules of Civil Procedure and is *contrary* to the decisions of Courts of Appeal of other circuits which have construed them.

2. The action of the Court of Appeals in directing entry of judgment for Respondent and denying Petitioners of a ruling on their timely motion for a new trial is inconsistent with the Federal Rules of Civil Procedure and is inconsistent with the decisions of this Court which have construed them.

3. The decision of the Court of Appeals in which it speculates, *without any evidence or legitimate inferences*, that the motion for new trial "might" have been abandoned, has so far departed from the accepted and usual course of judicial reasoning, as to call for an exercise of this Court's power of supervision.

## ARGUMENT.

This Court has strongly emphasized that while Rule 50(b) was adopted for the purpose of speeding litigation and preventing unnecessary retrials it will nevertheless hold as "untenable" any argument or any ruling which, (however couched in terms of expedition) serves to deny a litigant his historic right not only to file a motion for a new trial *but to have a ruling thereon.*

> *Montgomery Ward & Co.* v. *Duncan* (1940), 311 U. S. 243, 250, 85 L. ed. 147, 153, 154.

The action of the Court of Appeals in directing entry of judgment for Respondent and denying Petitioners of a ruling on their timely motion for a new trial, prayed for in the alternative and filed with their motion for judgment n.o.v., as permitted by Rule 50(b) of Federal Rules of Civil Procedure, is in conflict with decisions of other Circuits of Courts of Appeal, and is inconsistent with all other decisions in which this Court has construed this Rule, including the above and other leading cases. We shall deal first with the decisions of other Courts of Appeal.

### The Decision of the Court of Appeals Is in Conflict With the Decisions of Other Courts of Appeal on the Same Matter.

In the Fourth Circuit in the case of *Hawkins* v. *Sims* (4 Cir. 1943), 137 Fed. 2d 66, the facts are identical with the facts in Petitioners' case; after a jury verdict for plaintiff, defendant, having moved at the conclusion of the testimony for a directed verdict, made a motion for judgment n.o.v. in accordance with his motion for a directed

verdict, or, in the alternative, that the Court set aside the verdict as contrary to the law and the evidence and award a new trial. The motion to set aside the judgment was granted and upon appeal the District Court was reversed. The *plaintiff* urged that the *Court of Appeals should mandate the District Court to enter judgment for the plaintiff on the jury's verdict.* In ruling that the Court of Appeals *had no such powers* and that the *cause should be remanded with instructions to rule upon the alternative motion*, that Court, on page 67 of the opinion, said:

> "The judgment entered by the court below must accordingly be reversed but this does not mean that we should direct entry of judgment upon the verdict, as plaintiff argues. Defendant's alternative motion to set aside the verdict and grant a new trial has not yet been passed on by the trial court; and upon remand this should be done with full power in the trial judge to set aside the verdict and grant a new trial, if in his discretion he determines that the ends of justice so require. *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 61 S. Ct. 189, 85 L. ed. 147."

It is to be noted that the Fourth Circuit, in the above case, and the Seventh Circuit in the case now before this Court, cited the *Montgomery Ward* case as authority in support of their opinions. *The facts* giving rise to the decisions *are identical* in both cases, and the opinions are in *direct conflict.* It necessarily follows that one thereof must be in conflict with the opinion of this Court in the *Montgomery Ward* case.

In the Fifth Circuit in the case of *Banks* v. *Associated Indemnity Corporation, et al.* (5 Cir. 1947), 161 Fed. 2d 305, the same questions arose under the same facts, and the Court on page 314 said:

> "In the court below Associated joined to its motion for judgment n.o.v. an alternate motion for a new trial: 'In the event that this motion (for judgment

> n.o.v.) should not be granted, the mover prays that a new trial of this case be ordered.' *Having granted the motion for judgment n.o.v. no action was taken by the court below on the alternate motion. It stands undisposed of. Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 61 S. Ct. 189, 85 L. ed. 147."
>
> "For the reasons assigned the judgment appealed from is set aside *with directions to the court below to pass on Associated's motion for a new trial.* In the event the motion is overruled the court is directed to enter a judgment based upon the verdict of the jury." (Our emphasis.)

Once again it is to be noted that *Montgomery Ward* was cited as authority for the opinion of the court.

The Fifth Circuit in the case of *Atkins* v. *Halliburton Oil Well Cementing Company, et al.* (5 Cir. 1952); 196 Fed. 2d. 876, 878 and 879, said:

> "The better practice is for the trial court, in the event the motion for a judgment notwithstanding the verdict is granted, to rule also upon the motion for a new trial, where alternatively presented as authorized by Rule 50 of Federal Rules of Civil Procedure, 28 U. S. C. A. *However, failure to do so does not bar further consideration of such motion. Montgomery Ward & Company* v. *Duncan*, 311 U. S. 243, 61 Sup. Ct. 189, 85 L. ed. 147; *Banks* v. *Associated Indemnity Corporation*, 5 Cir., 161 Fed. 2d 305. In the latter case, this court, citing the *Montgomery Ward & Company* decision, *supra*, held that in such a case the motion for a new trial stood 'undisposed of.' In the present case, while we cannot approve the practice of dealing piece meal with the alternative motion, we treat the motion for a new trial referred to, but not disclosed, likewise." (Our emphasis.)

Here again the *Montgomery Ward* case was cited as authority for the opinion of the Court.

In the case of *Casper* v. *Barber & Ross Company* (D. C. 1961), 288 Fed. 2d, 379, beginning on page 383 the Court said:

> "After the jury had returned a substantial verdict for the appellant, the elevator company filed its timely motion entitled 'motion for judgment n.o.v., or, in the alternative, for a new trial'. Among the grounds stated for the latter, the elevator company asserted as error of law, the trial court's failure to instruct the jury on the doctrine of assumption of risk."
>
> "Apparently the trial judge assumed that if he granted the motion for judgment n.o.v., it would be unnecessary to rule upon the motion for a new trial *and that the latter motion had passed out of the case. That is not so.* The Supreme Court has pointed out that the motion for judgment notwithstanding the verdict and the judgment for a new trial for defendant have different and peculiar offices. The rule contemplates that either party to the action is *entitled* to the trial judge's decision on *both* motions, if both are presented. Again, 'the court should so administer the rule as to accomplish all that is permissible under its terms'." (Our emphasis.)

To the same effect see the following:

*Pruitt, et al.* v. *Hardware Dealers Mutual Fire Insurance Co., Stevens Point, Wisconsin,* 112 Fed. 2d 140, 143 (5 Cir. 1940).

*Pessagno* v. *Euclid Investment Company, Inc.,* 112 Fed. 2d 577, 578, 579 and 580 (D. C. 1940).

Barron and Holtzoff, *Federal Practice and Procedure* Vol. 2B (Wright 1961 Ed.) Sec. 1082 Pages 430 thru 432.

**The Court of Appeals Erroneously Pre-Empted the Trial Court's Function.**

It should be here pointed out that the Court of Appeals in directing entry of judgment and obliterating the pending motion for new trial was arbitrarily pre-empting the discretion and judgment historically reserved *for the trial judge only* under a motion for new trial. The motion for new trial (the grounds of which are hereinafter more fully set out); as distinguished from the motion for judgment n.o.v. has, and had in this case, its own peculiar office. It invoked the historic discretion of the trial judge on weight of the evidence. It also raised many questions of law as to erroneous admissions of evidence, erroneous instructions to the jury, erroneous ruling as to basic negligence, excessive damages and other serious legal questions, *none of which were before the Court of Appeals* under the motion for judgment n.o.v. and none of which should have been resolved by that Court.

In the case of *Marsh* v. *Illinois Central R. Co.* (5 Cir. 1949), 175 Fed. 2d 498 the court decided how a Court of Appeals should dispose of a motion for judgment n.o.v. as distinguished from a motion for new trial. It said at page 500:

> "The trial judge in considering those motions (n.o.v.) does not exercise discretion, but makes a ruling of law, and if he errs the Appellate Court may reverse. A motion for a new trial is addressed to the trial judge's discretion. He may grant a new trial if he thinks he has committed error; *and he may grant one (and he alone can) because he thinks the verdict is wrong, although supported by some evidence.* The exercise of his discretion is not ordinarily reviewable on appeal, and a failure to exercise discretion, or an abuse of it may be corrected. The motion for a new trial is entirely independent of the other two motions and is governed by different principles, and has a

different result. It never supersedes the jury but as its name states, it results in another jury trial, perhaps with different evidence produced. But the motion for directed verdict or for judgment notwithstanding the verdict if granted ends the case."

*"Rule of Civil Procedure 50, while altering the procedure in Federal courts, did not alter the nature and affect of these motions, and each is entitled to be decided according to the principles applicable to it without confusing them. Montgomery Ward & Co.* v. *Duncan,* 311 U. S. 241, 61 Sup. Ct. 189, 85 L. ed. 147." (Our emphasis.)

In the case of *General American Life Insurance Company* v. *Central National Bank of Cleveland* (6 Cir. 1943), 136 Fed. 2d 821, 822 and 823, in holding that it had *no authority* to direct the District Court to overrule the motion for a new trial and that the parties *were entitled to have their motion for a new trial ruled on* in the first instance *by the District Court,* said:

*"Appellant was entitled to have the court pass upon the motion for a new trial in the exercise of its own independent judgment.* This it has not had. It 'is entitled to have the court below weigh all the evidence, and exercise its discretion to say whether or not, in its opinion, the verdict was so opposed to the weight of the evidence that a new trial should be granted,' * * *.' *Felton* v. *Spiro, supra,* 78 Fed. page 583. *As pointed out in Montgomery Ward & Co.* v. *Duncan, supra, it is also entitled to have the court determine whether or not it should have a new trial upon any other ground* set forth in its motion therefor. For this purpose the case must be remanded, *with directions to the court below to consider and act in its own discretion upon appellant's motion for a new trial,* stating the reasons for his action. The result, whether one way or the other, may be certified to us in a supplemental record, and, along with other uncontroverted issues in the case, will be subject to review here under the procedure outlined in *Montgomery Ward & Co.* v. *Duncan, supra."* (Our emphasis.)

The Seventh Circuit, in earlier cases, has uniformly decided Petitioners' question contrary to what they have now held in the case at bar.

> *Vearn* v. *Crane* (7 Cir. 1940), 114 Fed. 2d 896, 897.

To the same effect see *Surdyk* v. *Indiana Harbor Belt R. Co.* (7 Cir. 1945), 148 Fed. 2d 795, where the Court says at page 798:

> "From what we have said it follows that the court erred in entering judgment non obstante veredicto. *Since motions for new trial are addressed to the nisi prius court, the cause must be remanded to the District Court.* *Walaite* v. *Chicago, Rock Island & Pacific R. Co.*, 376 Ill. 59, 33 N. E. 2d 119, and *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 61 S. Ct. 189, 85 L. ed. 147."

**Decisions of This Court.**

Under circumstances similar to those existing in Petitioners' case, this Court, in *Montgomery Ward*, 311 U. S. 243 at 253, has strongly emphasized that while Rule 50(b) was adopted for the purpose of speeding litigation and preventing unnecessary retrials it will hold as "untenable" any argument or ruling which (however couched in terms of expedition) serves to deny a litigant his historic right not only to file a motion for a new trial *but to have a ruling thereon.*

In construing Rule 50(b), the decisions of this Court have also consistently construed this rule as:

> (a) vesting in the District Court the discretion of deciding whether motions for a new trial filed in the alternative should be granted or overruled and what form of judgment should be entered, and
>
> (b) authority holding that the Court of Appeals *cannot exercise this discretion* given to the District

> Courts, and cannot mandate them to sustain or to overrule a motion for new trial, *but must remand to the District Court with instructions to exercise the discretionary power given that court* to rule on the motion for new trial.

This Court has refused to construe the federal rules to allow Courts of Appeals to interfere with trial judges' discretion to grant new trials:

> *Cone* v. *West Virginia Pulp & Paper Co.* (1947), 330 U. S. 212, 217-218, 91 L. ed. 849, 67 S. Ct. 752.
>
> *Globe Liquor Co.* v. *San Roman* (1948), 332 U. S. 571, 92 L. ed. 177, 68 S. Ct. 246.

In the case of *Globe Liquor Company* v. *San Roman, et al.* (1948), 332 U. S. 571, 92 L. ed. 177, 68 Sup. Ct. 246 petitioner sued respondents for damages; at the close of all the evidence each party made a motion for a directed verdict and petitioner's motion was granted and a judgment returned and entered for petitioner; respondents then moved for a new trial under Rule 50(b) but did not move to have the judgment set aside and a judgment entered in respondents' favor on its motion for a directed verdict as provided by Rule 50(b). Respondents' motion for a new trial was overruled and appealed to the Court of Appeals. That Court reversed the District Court and ordered judgment entered for respondents. This Court, in holding that the Court of Appeals *erred in directing entry of judgment in favor of respondents,* on page 573 of the opinion said:

> "Furthermore, the very circumstances which arose in this case emphasize the importance of having the District Court first pass upon whether *its error* should result in a new trial or in a judgment finally ending the controversy." (Our emphasis.)

And again on page 574 of the opinion it said:

> "What we said in the Cone case is peculiarly appropriate here: 'Determination of whether a new trial should be granted or judgment entered under Rule 50(b) *calls for the judgment in the first instance of the judge who saw and heard the witnesses* and has the feel of the case which no appellate printed transcript can impart.' *It was error therefore for the Circuit Court of Appeals to direct the District Court to enter judgment for the respondents.*" (Our emphasis.)

Petitioners' motion for a new trial has not been ruled on by *either* the District Court *or* the Court of Appeals. It is manifestly unjust to permit respondent to recover on a judgment regardless of how many prejudicial errors may have been committed by the District Court in the proceedings leading to the $25,000.00 verdict. It is equally unjust that your petitioners be deprived of any ruling on the merits of their motion for a new trial, asserting such errors. It is more than unjust. It is an arbitrary deprivation of "*property*" without "*due process of law*" as prohibited by the Fifth Amendment to the Constitution of the United States. This Court in the case of *Slocum* v. *New York Life Insurance Company* (1913) 228 U. S. 364, 57 L. ed. 879, said at page 399:

> "The right to a new trial in a case such as this, on the vacation of a favorable verdict secured from a jury, is a matter of *substance* and not of mere form."

The opinion of this Court in the case of *Fountain* v. *Filson* (1949), 336 U. S. 681, 93 L. ed. 971, 69 Sup. Ct. 754, also holds petitioners are entitled to a ruling on this motion for a new trial. On page 683 of the opinion this Court said:

> "In *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571, 92 L. ed. 177, 68 S. Ct. 246 (1948) and *Cone* v. *West Virginia Pulp & P. Co.*, 330 U. S. 212, 91 L. ed. 849, 67 S. Ct. 752 (1947) we held that judgment notwithstanding the

verdict could not be given in the Court of Appeals in favor of a party who had lost in the trial court and who had not there moved for such relief. *One of the reasons for so holding was that otherwise the party who had won in the trial court would be deprived of any opportunity to remedy the defect which the appellate court discovered in this case.*" (Our emphasis.)

In the case of *Cone* v. *West Virginia Pulp and Paper Company* (1947), 330 U. S. 212, 91 L. ed. 849, 67 Sup. Ct. 752, the court in considering the right of litigants to have their motions for new trials decided in the first instance by the District Court said, beginning on page 216 of the opinion:

> "*Determination of whether a new trial should be granted or a judgment entered under Rule 50 (b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart.* See *March* v. *Philadelphia & W. C. Traction Co.* 285 Pa. 413, 418, 132 A. 355; *Bunn* v. *Furstein*, 153 Pa. Super. Ct. 637, 638, 34 A. 2d 924. See also *Yutterman* v. *Sternberg* (CCA 8th), 86 F. 2d 321, 324, 111 ALR 736, 32 Am. Bankr. Rep. (NS) 392. Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone. He is thus afforded 'a last chance to correct his own errors without the delay, expense or other hardships of an appeal.' See *Greer* v. *Carpenter*, 323 Mo. 878, 882, 19 S. W. 2d 1046. Cf. *United States* v. *Johnson*, 327 U. S. 106, 112, 90 L. ed. 562, 566, 66 S. Ct. 464."
>
> "*There are other practical reasons why a litigant should not have his right to a new trial foreclosed without having had the benefit of the trial court's judgment on the question.*" (Our emphasis.)

To the same effect see *Johnson* v. *New York New H & H R. R. Co.* (1952) 344 U. S. 48, 73 S. Ct. 125, 97 L. ed. 77.

**Montgomery Ward & Company v. Duncan Is Decisive of the Procedure To Be Followed.**

In the case of *Montgomery Ward & Co.* v. *Duncan* (1940) 311 U. S. 243, the District Court, as in Petitioners' case, directed a judgment n.o.v. and failed to rule on a motion for a new trial filed in the alternative. In that case, as in Petitioners' case, the Court of Appeals reversed the District Court for granting the judgment n.o.v. and "remanded the cause with instructions to the District Court to enter judgment on the verdict in favor of the plaintiff," and "overruled the defendants' contention that the case should be remanded with leave to the trial court to dispose of the motion for a new trial." It is important to note this Court stated on page 247:

> "The importance of a decision by this Court *respecting the proper practice under rule 50 (b)* and *a conflict of decisions* moved us to *grant certiorari.*" (Our emphasis.)

This Court held that the District Court's granting of the motion for judgment n.o.v. did not effect an *automatic denial* of the alternative motion for a new trial, and that the petitioner was entitled to have its motion for a new trial ruled on by the District Court after the Court of Appeals had reversed for error in granting the judgment n.o.v. Beginning on page 261 of the opinion it said:

> "If however, as in the present instance, the trial court erred in granting the motion, the party against whom the verdict went is *entitled to have his motion for a new trial considered in respect of asserted substantial trial errors and matters appealing to the discretion of the judge.* In this case the reasons assigned in support of the motion for a new trial were in both categories. *The grounds assigned for a new trial have not been considered by the court.* In the circumstances here disclosed the uniform practice in state appellate courts

has been to remand the case to the trial court with leave to pass upon the motion for a new trial." (Our emphasis.)

After holding that the trial judge should rule on both the motion for judgment and the motion for a new trial in the alternative, the opinion concluded on page 255 as follows:

> "In the circumstances, we think the failure of the District Court to rule in the alternative on both matters *can be cured* without depriving the defendant of opportunity to have its motion for a new trial heard and decided by the trial court, *by modifying the judgment below to provide that the cause be remanded to the District Court to hear and rule upon that motion.*" (Our emphasis.)

At the trial, the verdict went against your Petitioners, and the Court of Appeals ruled that the District Court erred in granting your Petitioners judgment n.o.v. The above quoted language from *Montgomery Ward* emphatically states that your Petitioners are now entitled to have their motion for a new trial "*considered in respect of asserted substantial trial errors and matters appealing to the discretion of the judge.*"

The opinion of the Court of Appeals has now deprived your Petitioners of any opportunity to remedy the defect which the Court of Appeals discovered in the District Court's entry of the judgment n.o.v. Under the above decisions of this Court Petitioners are now entitled to a ruling on their motion for a new trial.

At this point we want to call the Court's attention to the fact that your Petitioners' motion for a new trial (Record pages 197 to 201) assigned, among other causes, the following errors:

(a) that the court erred in permitting the jury to determine whether the defendants were guilty of negligence for failure to install crossing gates or additional warning devices;

(b) that the verdict of the jury was not sustained by sufficient evidence and was contrary to law;

(c) that the court erred in refusing instructions tendered by both defendants;

(d) that the damages assessed by the jury were excessive;

(e) that the absence of crossing gates at the crossing as a matter of law was not negligence;

(f) that the trial court erred in taking from the jury their right to determine whether the plaintiff, under the evidence, was guilty of contributory negligence;

(g) that the court erred in permitting a witness to testify concerning a conversation he had with one of the train crew;

(h) that the court erred in permitting a policeman to testify that in his opinion the crossing was extra hazardous, and should have had gates or other warning devices and that there were other types of warning devices which should have been installed;

(i) that the court erred in permitting a witness to testify concerning his opinion as to the effectiveness of flasher lights such as were in operation at the crossing at the time of the accident.

Under each of the above cited cases the questions presented by the motion for new trial require the judgment and discretion of the trial court in the first instance. *The Court of Appeals was without power to deprive Petitioners of their right to this determination.*

**New Rule 50(c) Comes Too Late For Petitioners.**

The District Court Judge, undoubtedly engrossed in the excitement of his elevation to the Court of Appeals the next day and busily engaged in winding up miscellaneous court matters, understandably minimized Rule 50(b) and

overlooked the dictates of *Montgomery Ward* v. *Duncan* (supra). His granting of Petitioners' motion for judgment n.o.v. while neglecting to grant or deny on the motion for a new trial in the alternative put a twist to this case which was never contemplated by him or by the parties. The fact that Rule 50(b) does not expressly mandate the trial court to rule on both motions caused the situation in the instant case. But, as demonstrated by many of the cases cited herein, many other district judges have likewise relied on the permissive feature of the rule and have likewise failed to rule on the alternative motion for new trial. *However*, their Courts of Appeal, *unlike the Seventh Circuit in the instant case*, have followed *Montgomery Ward* and have directed the District Court Judge to *rule on the motion for new trial.*

This Court in *Montgomery Ward, Cone, Globe Liquor, Fountain* v. *Filson*, and *Johnson* v. *New York, etc.* (all cited and discussed supra) has attempted, but without complete success, to steer bench and bar in the post-trial procedures of Rule 50(b).

> "However, courts as well as counsel have often misunderstood the procedure * * *"
> Advisory Committee on Civil Rules—Notes to Proposed Rule 50 (c)—310 Fed. 2d (Supplement No. 4) (at page 59 of yellow supplement).

In view of the continuing procedural misunderstandings among bench and bar it is not surprising then, that this Court (with Justices Black and Douglas opposing) has recently (January 21, 1963) supplemented Rule 50 (b) with new Rule 50 (c) which now *mandates* the trial judge to rule on *both* motions. The situation presented in the instant case would not arise under new Rule 50 (c). Had there then been a Rule 50 (c) the District Court would have been *required* to rule on Petitioners' motion for new trial and (if denied) Petitioners would then (by assign-

ing cross error) have had an opportunity for a review of the legal questions therein presented in the Court of Appeals.

*But there was no Rule 50 (c) in 1961!* Petitioners have *not* had a ruling on their motion for new trial *and have therefore not had their day in court.* Only this Court can now do for Petitioners what its new Rule 50(c) will do for future litigants. Petitioners do not believe they should be the sacrificial guinea pig in the evolution and adoption of new Rule 50 (c).

**The Reasons Given in the Opinion of the Court of Appeals for Denying to Petitioners a Ruling on Their Motion for New Trial Are Erroneous and Non-Existent.**

In the language of the opinion, the only reasons given for denying Petitioners a ruling on their motion for new trial are stated as follows:

> "In *Montgomery Ward* there was a sustained effort to have the District Court rule on the alternative motion under Rule 50 (b). There was no showing here that any similar attempts were made after judgment notwithstanding the general verdict was entered under Rule 49(b). On this record the District Court might, with justification, have assumed that appellees had abandoned the motion."

**(a) "Sustained Effort."**

As to Petitioners' failure to make a "sustained effort to have the District Court rule on the alternative motion under Rule 50(b)" we call the Court's attention to *Montgomery Ward* in which, in construing Rule 50(b) it said at page 251:

> "The Rule contemplates that *either party to the action* is entitled to the trial judge's decision on *both* motions, if both are presented."

Under the decision of *Montgomery Ward* it was the *duty* of the District Court to rule on Petitioners' motion for new trial for the benefit of *both* parties. Petitioners had orally argued and had submitted written briefs on both motions at the same time. Petitioners had a right to assume that the trial court would follow *Montgomery Ward* and rule on both motions. What further urging ("sustained effort") was necessary? The question is particularly pertinent in view of the fact that the court took its ruling on both motions under advisement, ruled thereon without counsel being in court and departed the next day to be sworn in as a Justice of the Court of Appeals.

The opinion seems to place the burden of getting a ruling on Petitioners. We submit that *Montgomery Ward* is *not* authority for thus placing the burden *on Petitioners* to obtain a ruling on the alternative motion for new trial for in that case it was the *plaintiff* (Respondents here) who made the sustained effort to have the trial court rule on *defendants'* (Petitioners here) motion for new trial.

**(b) There Was No Abandonment.**

As to that part of the opinion which reads "on this record the District Court might with justification have assumed that Appellees had abandoned the motion" we submit that since it was the *duty*, as per *Montgomery Ward*, of the District Court to rule on the motion for new trial, the Court of Appeals had no power, by resorting to a purely speculative theory of abandonment, thus to deprive Petitioners of a ruling on their motion for new trial. *It cannot guess as to why the trial court failed to rule on the motion!* There is *nothing* in the record to show (*or even intimate*) that the District Court might have "assumed" an abandonment of the motion. In fact, the record affirmatively shows that the motion was orally argued on October 6, 1961 (Record Docket Entry of 10-6-61) and briefs on both

motions were submitted (see Appendix to this petition—P. 10a). The record further shows that the Court took the motions and said briefs under advisement (Record Docket Entry of 10-6-61) and thereafter entered its ruling on the judgment n.o.v. in the absence of counsel (Record Docket Entry of 10-10-61). Early the next day he left for Chicago to be sworn in as Judge of the Court of Appeals. On the morning of his departure Petitioners had unsuccessfully attempted to contact him to rule on the motion. This hardly sounds like abandonment.

The Court of Appeals' opinion, depriving Petitioners of their ruling on the motion for new trial, was based on *two assumptions*:

(a) that the District Court *might* have assumed abandonment of Petitioners' motion, and

(b) the District Court *did* assume abandonment.

*This is speculation based on speculation.* Such can never substitute for probative facts.

*Galloway* v. *United States* (1943), 319 U. S. 372, 395, 85 L. ed. 1458, 1473.

The record not only fails to show a basis for either of these assumptions but, as above stated, *affirmatively shows to the contrary!*

If it can be said that there was any further duty on the part of *either* party to secure a ruling on the motion for new trial Respondent's duty was greater than that of Petitioners, for Respondent, under *Montgomery Ward*, if she wanted a single appeal, should have secured a ruling on both motions. She *who elected to appeal*, was the party chargeable with bringing up a complete record to the Court of Appeals. Both motions had been presented to the District Court, and if Respondent desired a complete

record the duty was upon *her* to secure the ruling on the motion for new trial, before taking her appeal.

It is to be noted that Petitioners, *at a time when they didn't yet know whether Respondent intended to appeal*, nevertheless made every "effort" to secure a ruling, from the *only* man (the trial judge) who was capable of ruling. The only remaining Judge (Grant), not having heard the case and *there then being no transcript available* (until 4 months later) could not possibly have then ruled on the motion. Nor could the Court of Appeals do so. It is ironic (and unjust) that the *appealing party*, who did *nothing* to secure a ruling (and thus get a complete record for a single appeal) should now be given the benefit of their own inaction.

In many of the cases dealing with undisposed of motions for new trial under Rule 50(b) attempts were made to *wash* the motion out of the case without an actual ruling thereon. The theories advanced to support such attempts range from "automatic denial", "passed out of the case" to "election or withdrawal". Similarly, in the case at bar, the opinion speculates as to a possible "abandonment". Thus far Courts of Appeals have been denied this grasp for additional power over trial court prerogatives. Thus "election or withdrawal" was urged in the *Montgomery Ward* case. In rejecting such contention the court on page 249 of the opinion said:

> "We are, however, unable to spell out any such *election* or *withdrawal*. The motion for a new trial assigned grounds not appropriate to be considered in connection with the motion for judgment. It put forward claims that the verdict was against the weight of the evidence and was excessive; that the court erred in rulings on evidence and in refusing requested instructions. An affirmative finding with respect to any of these claims would have required a new trial, whereas

none of them could be considered in connection with the motion for judgment * * *"

"We come then to the substantial question which moved us to issue the writ, namely, *whether under Rule 50(b) the District Court's grant of the motion for judgment effected an automatic denial of the alternative motion for a new trial. We hold that it did not.*" (Our emphasis.)

It must likewise here be true that a failure of the trial judge to rule on the alternative motion for new trial, all without fault or neglect of Petitioners, followed by his immediate elevation to a higher bench, could not and does not effect an abandonment of that motion.

There is no decision of this Court which deprives a litigant of a ruling on a pending motion for new trial on the theory that the motion passed out of the case by "automatic denial", "election or withdrawal" *or any similar fiction.* Certainly there is no authority which allows a Court of Appeals to speculate it out of the case on the *guess* that the trial court "*might*" have "*assumed*" it was abandoned. *Montgomery Ward* says such theories, even though they might serve to expedite litigation, are "*untenable*" (page 252).

A motion for new trial has always been an integral part of our judicial system of justice. Historically it has served as the instrument by which a litigant calls upon the inherent discretion of the trial judge, raises questions of law and erroneous admissions or rejections of evidence. Petitioners have raised these same questions in their motions for new trial. What peculiar "justice" is there in this case which calls for denying to them an adjudication upon their motion which raises these questions. Can Petitioners be deprived of a ruling on their motion for a new trial by a mere unfounded *assumption* by the Court of Appeals that the District Court *might have thought* Peti-

tioners had abandoned their motion for a new trial? Certainly not.

Petitioners' motion for new trial is still in this case *undisposed of*. The Court of Appeals did not (and indeed could not) rule on it. In this situation it must be apparent that Petitioners *have not yet had their day in Court!* For the Court of Appeals to direct the trial court to enter a final money judgment for Respondents without *ever* giving Petitioners an opportunity to have the *merits* of their motion for new trial ruled on or reviewed, is a clear *miscarriage of justice* which must be corrected by this Court.

## CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for Writ of Certiorari should be granted.

Dated May 13, 1963.

RUSSEL J. WILDMAN,
*Counsel of Record for Petitioner Chesapeake & Ohio Railway Company,*

STANLEY A. TWEEDLE,
*Counsel of Record for Petitioner The Erie Railroad Co.*

# APPENDIX.

UNITED STATES DISTRICT COURT,
Northern District of Indiana,
Hammond Division.

LOIS BRAY VERA CRUZ,
*Plaintiff,*
*vs.*
CHESAPEAKE & OHIO RAILWAY COMPANY AND ERIE RAILROAD COMPANY.
*Defendants.*

Hammond Civil No. 2661

## OPINION.

The jury was required to answer certain interrogatories relating to the conduct of each defendant as well as of the driver of the automobile. The answers to the interrogatories were to the effect that defendant Erie Railroad had failed to provide adequate warning devices at the crossing, which, according to the jury was an extra-hazardous crossing; and that this failure to provide adequate warning devices was a proximate cause of the collision. The answers were further to the effect that defendant Chesapeake and Ohio Railway Company was negligent in that it operated its train at an excessive speed at a 'crossing unguarded by gates,' and that this act of negligence was also a proximate cause of the collision.

The primary question, in my opinion, is whether the answers to the interrogatories are inconsistent when considered in relation to each other and in relation to the general verdict which was in favor of the plaintiff.

It has been held repeatedly in Indiana cases involving collision at railroad crossings that speed alone cannot be the basis of negligence on the part of a railroad company. There must be attending circumstances which amount to a failure to give adequate warning in order to render the speed a material factor. *Union Traction Co. of Indiana* v. *Howard*, 90 N. E. 764, cited with approval in *Pennsylvania Ry. Co.* v. *Rizzo*, 86 N. E. 2d 91.

In the instant case the jury found that the only negligent conduct of the C. & O. was the excessive speed with which its train was operated at a crossing for which gates were not provided. It further found that Erie, who is the owner of the crossing property and the tracks over which the train was operated, was guilty of negligence in not providing adequate warning devices.

At the same time, however, the jury found that the driver proceeded against the warning flasher lights and was thereby negligent. With this later finding, it becomes obvious that the driver of the car had, in fact, been warned of the approaching train and was negligent in proceeding in the face of such warning.

Accordingly, since the jury found that the driver of the car had received warning of the approaching train, the question of whether or not the flasher lights provided by Erie were adequate warning devices becomes immaterial.

As a matter of law, the driver of the car was not entitled to an additional or different warning, so long as she was made aware of the approaching train but nevertheless proceeded into its path. Therefore, the failure to provide gates could under no circumstance have been a causative factor.

For the same reason, once the driver was adequately warned, the speed of the C. & O. train could not have been a causative factor because the speed of the train must have

been coupled with some failure to warn in order to ground liability on excessive speed. Thus, it must be determined as a matter of law that the conduct on the part of the driver of the automobile was the sole proximate cause of the collision. *Constantine v. Pennsylvania Ry. Co.*, 114 F. 2d 271; *Chicago, Milw., St. P. and P. Ry. Co. v. Slowik*, 184 F. 2d 920.

Having arrived at this determination, the verdict for the plaintiff cannot stand and the defendants' motion for judgment notwithstanding the verdict must be granted. An order to that effect follows.

**Order and Judgment.**

For reasons stated in the above opinion the defendants' motion for judgment notwithstanding the verdict is granted.

IT IS ORDERED, ADJUDGED AND DECREED that the defendants have judgment against the plaintiff together with their costs taxed herein.

/s/ LUTHER M. SWYGERT.

ENTER:
Hammond, Indiana,
October 10, 1961."

(Transcript of Record, pages 230, 231, 232.)

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 13618 SEPTEMBER TERM, 1962 JANUARY SESSION, 1963

Lois Bray Vera Cruz,
*Plaintiff-Appellant,*
*vs.*
Chesapeake & Ohio Railroad and The Erie Railroad Co.,
*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

January 10, 1963

Before HASTINGS, *Chief Judge*, SCHNACKENBERG and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* This is a diversity personal injury action with a general verdict for plaintiff. The District Court, however, entered judgment notwithstanding the verdict for defendants on the basis of special interrogatories. Plaintiff has appealed.

Plaintiff was injured when the Volkswagen in which she was a passenger was struck at night on a Hammond, Indiana crossing by a Chesapeake and Ohio freight train operated on Erie Railroad tracks.

In addition to the verdict for plaintiff, the jury in special interrogatories found that the driver of the Volkswagen was negligent in failing to stop for the flasher signals at the crossing, but that the driver's negligence was not the

sole proximate cause; that the Erie was negligent in failing to provide adequate crossing gates at the "extra-hazardous or unusually dangerous crossing" and its negligence proximately caused the collision; and that the Chesapeake and Ohio, in view of the lack of crossing gates, was negligent in speeding excessively and that its negligence was a proximate cause.

The District Court concluded that the special interrogatories were inconsistent with the general verdict and entered judgment notwithstanding the verdict under Rule 49(b), Federal Rules of Civil Procedure. The question is whether that conclusion is erroneous.

The District Court thought that the Erie could not be guilty of negligence in failing to provide gates because the jury found that the driver had been warned by, and disregarded, the flasher signals; that consequently the Chesapeake and Ohio could not have been negligent because, under Indiana law, excessive speed alone could not be negligence; and that therefore the driver's negligence must have been the sole proximate cause.

We think, however, that the special interrogatories and the general verdict are harmonious, *Theurer* v. *Holland Furnace Co.*, 124 F. 2d 494, 497 (10th Cir. 1941),[1] 5 Moore, Federal Practice 2211 (2d ed. 1951). Even though the jury found that plaintiff's driver's negligence contributed to proximately cause the collision, the jury could consistently find, as it did, that the negligence of the Erie in coopera-

1. "It is plain that the general verdict must yield when it is so clearly at variance with one or more of the answers [to the special interrogatories] that the two are irreconcilable in a legal sense. But every reasonable intendment in favor of the general verdict should be indulged in an effort to harmonize the two. The answers override the general verdict and warrant the entry of judgment in disregard of the latter only where the conflict on a material question is beyond reconciliation on any reasonable theory consistent with the evidence and its fair inferences." 124 F. 2d 494, at 498.

tion with that of the Chesapeake and Ohio also contributed to proximately cause the collision.

The District Court virtually set aside the special interrogatory finding that the driver's negligence was not the sole proximate cause, and thus raised the inconsistency found. The special interrogatories did not limit the findings the jury could have made; and plaintiff's driver's negligence was not imputable to plaintiff. *Constantine* v. *Pennsylvania R. Co.*, 114 F. 2d 271, 274 (7th Cir. 1940).

The jury could reasonably have found that the highway on which the Volkswagen was being driven at night was heavily travelled; that, in view of the practice of switching and standing of trains near the crossing, the Erie should have maintained gates; and that the Chesapeake and Ohio, for these reasons, knew or should have known of the dangerous nature of the crossing when, at night, it operated "all three diesel engines wide open" drawing sixty-five cars across the busy Hammond street. The findings of negligence, proximately causing the accident, against the Erie and the Chesapeake and Ohio are supported by substantial evidence and the law of Indiana.[2]

Since we decide that the special interrogatories and general verdict are harmonious, we hold that the judgment is erroneous, because unauthorized by Rule 49(b).[3]

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2. *Constantine* v. *Pennsylvania R. Co.*, 114 F. 2d 271, 274, 278 (7th Cir. 1940), *Elgin J. E. Railroad Co.* v. *Sherer*, 121 Ind. App. 477, 98 N. E. 2d 369 (1951). We agree that speed alone does not constitute negligence. But the jury found more than speed here. "• • • the rate of speed to be used in a given case depends on the nature of the crossing and other circumstances surrounding the alleged injury." *Brooks* v. *Muncie & Portland Traction Co.*, 176 Ind. 298, 306, 95 N. E. 1006, 1010 (1911).

3. Rule 49(b), FEDERAL RULES OF CIVIL PROCEDURE, provides in part: "When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the

Appellees' motion for judgment notwithstanding the general verdict was joined with an alternative motion for a new trial, on which the District Court did not rule. Appellees cite *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243 (1940), as requiring this court to remand for a ruling on their alternative motion. But their brief fails to argue the application of that rule here. In *Montgomery Ward* there was a sustained effort to have the District Court rule on the alternative motion under Rule 50(b). There is no showing here that any similar attempts were made after judgment notwithstanding the general verdict was entered under Rule 49(b). On this record the District Court might, with justification, have assumed that appellees had abandoned the motion. Under the peculiar circumstances of this case, we think justice requires that we remand with directions to vacate the judgment notwithstanding the verdict and to enter judgment on the general verdict for plaintiff.

For the reasons given, the judgment is Reversed and Remanded, with directions.

SCHNACKENBERG, *Circuit Judge* dissenting: Finding no error in the proceedings in the district court, I would affirm the judgment from which this appeal has been taken.

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general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial."

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Thursday, January 10, 1963.

Before

Hon. John S. Hastings, Chief Judge,
Hon. Elmer J. Schnackenberg, Circuit Judge,
Hon. Roger J. Kiley, Circuit Judge.

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Lois Bray Vera Cruz,
*Plaintiff-Appellant,*
No. 13618 *vs.*
Chesapeake & Ohio Railroad and The Erie Railroad Co.,
*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

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This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, with costs, and that this cause be, and it is hereby Remanded to the said District Court with directions to vacate the judgment notwithstanding the verdict and to enter judgment on the general verdict for plaintiff, in accordance with the opinion of this Court filed this day.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 13618.

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|---|---|
| Lois Bray Vera Cruz,<br>*Plaintiff-Appellant,*<br><br>*vs.*<br><br>Chesapeake & Ohio Railroad and The Erie Railroad Co.,<br>*Defendants-Appellees.* | Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.<br><br>Honorable Luther M. Swygert, District Judge. |

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## AFFIDAVIT IN SUPPORT OF APPELLEES' PETITION FOR REHEARING.

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STANLEY A. TWEEDLE, being first duly sworn on oath, deposes and says:

1. That he and Russel J. Wildman are attorneys for Defendants-Appellees, The Erie Railroad Co. and The Chesapeake and Ohio Railway Company, respectively; that they, as attorneys, have participated in these proceedings from their inception, including all post trial and appellate proceedings.

2. That on July 29, 1961, they filed jointly on behalf of their clients, a motion for judgment notwithstanding the verdict and in the alternative a motion for new trial.

3. That on October 6, 1961, they orally argued both of said motions before the District Court and on said day submitted written briefs to the court in support thereof, which said briefs are part of the record in this court on appeal as shown by the separate certificate of the Clerk of the District Court in this cause attached to said briefs stating:

> "Attached hereto and made a part hereof of the Record on Appeal are Briefs which were forwarded by counsel directly to Judge Swygert and do not bear a file mark.
>
> KENNETH LACKEY, *Clerk.*
>
> s/ MARILYN LANEAR,
> Marilyn LaNear,
> *Deputy Clerk.*"

that said certificate is in error to the extent that it states the briefs were "forwarded" to Judge Swygert when in fact they were actually handed to him at the time of the oral argument on the motions; that after said oral argument had progressed for almost two hours and while Russel J. Wildman was then arguing his written brief which dealt only with the rights of appellees to a new trial, the court announced that he could not give more time to the oral argument because of the press of other court business due to the fact that he was heavily engaged in cleaning up court business in preparation for his soon being sworn in as Circuit Judge of the United States Court of Appeals. At said time he promised that before he ruled on said motions he would read and study both of said briefs which previously had been handed to him.

4. That on October 10, 1961 Judge Swygert entered his order sustaining appellees' motion for judgment n.o.v. and made no ruling on the motion for new trial; that appellees' attorneys were not in court at the time of said entry and had not been notified that said entry was to be made.

5. That said court on October 10, 1961, mailed a copy of said order and accompanying opinion to appellees' attorneys; that same were received on October 11, 1961; that immediately upon the receipt of said order and opinion, and in the forenoon of October 11, 1961, appellees' counsel went to the District Court to ask Judge Swygert to rule on the alternative motion for a new trial only to find that he had already left for Chicago to be sworn in as Circuit Judge of the United States Circuit Court of Appeals; that said Judge Luther M. Swygert was in fact sworn in as such Judge on October 11, 1961, and thereby lost jurisdiction to make further entries in these proceedings.

6. That the departure of Judge Swygert left the Honorable Robert Grant as the sole Judge of the entire Northern District of the State of Indiana with Divisions at South Bend, Fort Wayne, Hammond and Lafayette; that Judge Grant was, during this period of time, holding court in some Division other than in the Hammond Division where this case was tried; that Judge Grant remained as sole Judge for seven months until May 14, 1962, when he finally received help for a congested and heavy work load by the addition of two more District Court Judges.

And further affiant sajth not.

/s/ STANLEY A. TWEEDLE,
Stanley A. Tweedle,

Subscribed and sworn to before me this 21st day of January, 1963.

/s/ BERNARD A. PETRIE,
Bernard A. Petrie,
*Notary Public.*

My Commission Expires: March 21, 1964.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Thursday, February 14, 1963.

Before

Hon. John S. Hastings, Chief Judge,
Hon. Elmer J. Schnackenberg, Circuit Judge,
Hon. Roger J. Kiley, Circuit Judge.

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Lois Bray Vera Cruz,
*Plaintiff-Appellant,*
No. 13618 *vs.*
Chesapeake & Ohio Railway Company, et al.,
*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

---

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

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JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, A.D. 1962

No. ~~1054~~ 126

CHESAPEAKE & OHIO RAILWAY COMPANY, and THE ERIE RAILROAD CO.,

*Petitioners,*

vs.

LOIS BRAY VERA CRUZ,

*Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

## BRIEF FOR RESPONDENT IN OPPOSITION.

SAUL I. RUMAN,
5305 Hohman Avenue,
Hammond, Indiana,
WEstmore 2-6070,

*Counsel of Record for Respondent Lois Bray Vera Cruz.*

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago
Telephone: Financial 6-3988

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IN THE

# Supreme Court of the United States

OCTOBER TERM, A.D. 1962

## No. 1094

**CHESAPEAKE & OHIO RAILWAY COMPANY, and THE ERIE RAILROAD CO.,**

*Petitioners,*

VS.

**LOIS BRAY VERA CRUZ,**

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.**

## BRIEF FOR RESPONDENT IN OPPOSITION.

### OPINIONS BELOW.

Correct as stated in Petitioners' Brief.

### GROUNDS FOR INVOKING THIS COURT'S JURISDICTION.

There are no additions or corrections to Petitioners' statement of grounds found in the Petition at Page 2.

## QUESTIONS PRESENTED FOR REVIEW.

The questions presented are:

1. When a party files a motion and permits the trial court to proceed to judgment without action upon his motion, and fails to request action on said motion from the trial court during approximately the four months said cause pends in the District Court prior to appeal, and fails to request action on said motion during appearances in said District Court subsequent to judgment on Pauper's Petition, and fails to cross-appeal requesting ruling on said motion, and fails to request ruling on motion for new trial during oral argument in the Court of Appeals, can the Court of Appeals find that the motion has been waived or abandoned?

2. Is the Court of Appeals' decision in the case at bar contradictory to the case of *Montgomery Ward* v. *Duncan*, (1949) 311 U.S. 243, 85 L. ed. 147, 61 S. Ct. 189?

## CONSTITUTIONAL PROVISIONS, RULES, ETC. INVOLVED.

Rule 74 of the Federal Rules of Civil Procedure reads:

> "Parties interested jointly, severally or otherwise in a judgment may join in an appeal therefrom; or, without summons and severance, any one or more of them may appeal separately or any two or more of them may join in an appeal."

Supreme Court Rule 19 reads as follows:

> "(1) A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are *special and important reasons therefor.* The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: * * *" (our emphasis)

Federal Rules of Civil Procedure, Rule 50(c) reads as follows:

> "(2) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for new trial." (adopted January 21, 1963)

## CONCISE STATEMENT OF THE CASE.

Petitioners' statement of the case is satisfactory except for the following omitted items:

1. That the judgment of the District Court N.O.V. did not reserve ruling on Defendants' motion for a new trial. (Transcript of Record, pp. 230, 1, 2)

2. The District Court's order granting Defendants-Petitioners a judgment N.O.V. but without ruling on motion for a new trial was handed down on *October 10, 1961.* (Transcript of Record, pp. 230, 1, 2)

3. Petitioners-Defendants appeared in District Court and argued Respondent's request for Pauper's Appeal on *November 3, 1961.* (Transcript of Record, pp. 246, 7, 8)

4. This cause pended in the District Court until transcript of record was filed on *February 2, 1962*, approximately three months from date of entry of judgment. (Cover of Transcript of Record)

5. At no time during Defendants' appearance in District Court before the judge for hearing on Pauper's Appeal on October 30, 1961, nor during the period of approximately four months this action remained in the District Court until transcript of record was filed in the Court of Appeals on *February 2, 1962*, did Petitioners file or make a motion with either the District Court or Court of Appeals requesting a ruling on their motion for a new trial.

6. That Petitioners made no request of any judge sitting in the District Court in the Northern District of

Indiana, although one was sitting in one of the divisions at all times, nor of the judge of the Hammond Division who had been elevated to the Court of Appeals for the Seventh Circuit, nor of the Court of Appeals for the Seventh Circuit for ruling on their motion for new trial.

7. That no request by Petitioners or notice was given to Respondent of said Petitioners' desire for ruling on said motion for new trial any time after entry of judgment of *October 10, 1961*, during pendency in the District Court.

8. That Petitioners did not cross-appeal asking for ruling on their motion for new trial or to preserve errors.

9. That Petitioners did not during oral argument before the Court of Appeals request or argue their right to ruling on motion for new trial.

## REASONS FOR NOT GRANTING THE WRIT.

1. The Court of Appeals was justified in finding waiver or abandonment by Defendants of a ruling on their motion for a new trial as a result of Defendants' failure to make any request of the District Court or Court of Appeals for ruling on their motion for a new trial.

2. The Court of Appeals was justified in finding that by failing to file a cross-appeal asking for ruling on its motion for a new trial, the Defendants had not preserved the question of said ruling, and the issue was waived or abandoned.

3. That the policy against piece-meal appeals should not permit a Defendant to leave motions undisposed of in a trial court and then after reversal of the judgment N.O.V. in its favor ask that the case be again returned to the trial court for ruling on undisposed of motions. This would mean in the case at bar that this cause could reach the Supreme Court of the United States on two appeals after one trial and still not be disposed of since a new trial could result with subsequent appeals.

4. Since the District Court judge in the case at bar is now a member of the Court of Appeals of the Seventh Circuit and a new District Court judge is sitting in the Northern District of Indiana, Hammond Division, the review given this matter by a Court of Appeals by reviewing the record would seem to be as adequate a review as could be had in the trial court by a single judge unfamiliar with the trial.

5. In this case, the Court of Appeals for the Seventh Circuit properly followed the Supreme Court case of *Montgomery Ward & Company* v. *Duncan*, (1940) 311 U.S. 243, 85 L. ed. 147, 61 Sup. Ct. 189.

## ARGUMENT.

### THERE IS NO CONFLICT OF DECISIONS.

Rule 50(b) of the Federal Rules of Civil Procedure provides for the filing of alternative motions for new trial and for judgment N.O.V.

It is a well-established principle of law that a party who files a motion and permits the court to proceed without requesting ruling on that motion has waived and/or abandoned that motion (*Walker Investment, Inc.* v. *American Exp. Field Warehousing Corp.* (Fla. Cir. 1960), 276 F. 2d 591; *United States* v. *McCoy*, (1904) 193 U.S. 593, 48 L. ed. 805, 24 S. Ct. 528; *Fidelity & C. Co.* v. *Thompson*, 154 F. 484, 11 L.R.A. (N.S.) 1069 (C.C.A. 8th, 1907) 60 C.J.S. Motions and Orders, §42, p. 42; 4 C.J.S. Appeal and Error, §363, p. 1212; 4 C.J.S. Appeal and Error, e. Motion, §321, p. 1026). The obvious logic of this rule is so that a party may not sit back in the trial court leaving one of its motions undisposed of, and then for the first time on appeal complain to the Court of Appeals that said motion was not disposed of requiring a piece-meal appeal with the case remanded to the trial court for ruling on the motion. Where no ruling is made on a motion, it is presumed waived. (60 C.J.S. Motions and Orders, §42, Page 42)

It is also a well-established policy that there should not be piece-meal appeals. (*Libby-Owens-Ford Glass Co.* v. *Sylvania Industrial Corp.* (C.C.A. 3rd. 1946), 154 F. 2d 814; Cert. denied 60 S. Court 1353, 328 U.S. 59, 90 L. ed. (1630).

In *Montgomery Ward & Co.* v. *Duncan* (1940), 311 U.S. 243, 253, 254, 85 L. ed. 147, 61 S. Ct. 189, the Supreme

Court decided that when alternative motions are filed under Rule 50(b) the District Court should rule on both motions so the judgment will be final and piece-meal appeals not required, although the court found because of past procedence in dealing with this situation in the case at bar it should be remanded for new trial ruling. The court said, "If alternative prayers or motions are presented, as here, we note that the trial judge should rule on the motion for judgment. *Whatever his ruling thereon, he should also rule on the motion for new trial, indicating the grounds of his decision* * * * If the trial judge, as he did here, grants judgment N.O.V. and denies a motion for a new trial, the party who obtained the verdict may, as he did here, appeal from that judgment. Essentially, since his action is subject to review, the trial judge's order is an order *nisi*. A judgment on the verdict may still stand, because the Appellate Court may reserve the trial judge's action. This being so, *we see no reason why the Appellee may not, and should not, cross-assign error, in the Appellant's appeal, to rulings of law at the trial, so that if the Appellate Court reverses the order for judgment N.O.V. it may pass on the errors of law which the Appellee asserts nullified a judgment on the verdict.*" (Headnotes 6 & 7, Pages 253, 254)

Thus, in 1940 the *Montgomery Ward* case clearly stated what is now Federal Rule of Civil Procedure 50(c) are in keeping with the judicial principles of requiring a party to obtain disposition of all of his motions in the trial court and not sit back and complain for the first time on appeal of an undisposed of motion and also to avoid piece-meal appeals. (Barron and Holtzoff, 2B Federal Practice and Procedure, S. 1082, p. 438)

The decision of the Court of Appeals for the Seventh Circuit in this case at bar follows the *Montgomery Ward* case which has not been overruled, and is reiterated in Federal Rule of Civil Procedure 50(c), passed January of 1963. The failure of the Defendants to request any ruling on their motion for a new trial from either the District Court or the Court of Appeals prior to the appeal and for some three months while said cause pended in said District Court, and during which time Defendants appeared for hearing on Pauper's Appeal in this action was more than sufficient basis for the Court of Appeals finding that ruling on said motion was waived and/or abandoned.

In addition, under Rule 74 of the Federal Rules of Civil Procedure, authorizing cross-appeals and under the *Montgomery Ward* case indicating that when ruling on motion for new trial is complained of, party filing said motion may raise said issues by cross-appeal. The failure to do so would be abandonment or waiver of said motion. It is repeatedly held that in the absence of a cross-appeal, an Appellee may not attempt either to enlarge his rights under a judgment appealed from or to lessen the rights of an Appellant. (*Morley Const. Co.* v. *Maryland Casualty Co.*, (1937) 57 S. Ct. 325, 327-328, 300 U.S. 185, 191-192, 81 L. ed. 593) The application of this rule is demonstrated by the case of *J. P. Majors & Son, Inc.* v. *Lippert Bros., Inc.* (C.C.A. 10th, 1958), 263 Fed. 2d 650. In this case, Defendant requested judgment N.O.V. and complained of excessive damages. The court reduced Plaintiff's judgment and Plaintiff appealed. Defendant filed cross-appeal raising questions on judgment N.O.V. but dismissed said appeal. The court held it was unnecessary to consider Defendant's motion for judgment N.O.V. since it would have enlarged Defendant's right and must have been raised under cross appeal.

In our cause at bar, the Defendants could have raised all questions as to rights under motion for a new trial by cross-appeal, and to send the action back to the District Court for ruling on motion for new trial would be to enlarge the rights of the Defendants in the case at bar without them having cross-appealed to protect said rights.

If the case at bar is sent back to the trial court for a new trial, it would mean that the Defendants without requested ruling on a motion and allowing case in trial court to be disposed of and appealed without ruling on said motion, and without raising any question as to the propriety of the trial court's conduct or preserving of their right by cross-appeal were in a position of letting error go uncomplained of or unpursued by them until they saw the outcome of other questions on appeal, and if they lose, then require the case to be sent back for rulings on their undisposed of motions causing multiple appeals

In the other Court of Appeals and District Court cases, Respondent submits those courts did not follow the *Montgomery Ward* case nor was the issue of waiver, abandonment and failure to cross-appeal decided.

## THE COURT OF APPEALS DID NOT PRE-EMPT THE TRIAL COURT'S FUNCTION.

It is a well-settled principle of law that a Defendant who filed a motion in the trial court must make every effort to see that that motion is disposed of in the trial court, and if he takes no action to obtain a ruling by the trial court, it is a waiver and/or abandonment of his right to such ruling. Obviously, when the basis for the abandonment or waiver is failure to obtain a ruling from the trial court, only a Court of Appeals could make that finding. As with all motions filed in the trial court and undisposed

of, the Court of Appeals must decide if there was any effort to obtain a ruling and/or if it was waived or abandoned. That is purely the function of Courts of Appeals and is no invasion of the trial court's function.

In addition to this Court of Appeal's finding, waiver and/or abandonment of the motion by failing to obtain ruling in the trial court, the Court of Appeals also found that the Defendants failed to present the issues by way of cross-appeal as to the failing to obtain a ruling as required by the *Montgomery Ward* case and policies against piecemeal appeals.

## MONTGOMERY WARD & CO. v. DUNCAN IS FOLLOWED BY THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN THIS CASE.

Under headnotes 6 and 7, *Montgomery Ward*, 311 U.S. 253, 254, Supreme Court of the United States clearly requires that the trial court in disposing of alternative motions for judgment N.O.V. and new trial, rule on both motions. They said, "Furthermore, the very circumstances which arose in this case emphasizes the importance of having the District Court first pass upon whether *its error* should result in a new trial or in a judgment finally ending the controversy." (their emphasis) It further clearly requires that a Defendant who wishes to preserve questions raised by a motion for new trial not disposed of by trial court should file a cross-appeal. The court makes it clear that the only reason it sent back the case at bar for ruling on motion for a new trial was that it was the first decision by the Supreme Court on that question and that the procedure of not disposing of motion for new trial when judgment N.O.V. was entered had been followed by the state in which this case was tried in prior cases and years.

*Montgomery Ward* has stood without reversal or change by the Supreme Court of the United States since 1940, and because of the failure of some courts to follow the procedure set out, was re-stated in the revised Federal Rules of Civil Procedure, Rule 50(c).

Therefore, failure of Defendants to obtain ruling on their motion for a new trial from the District Court as required under the *Montgomery Ward* case would constitute a waiver and abandonment of right to ruling on that motion. In addition, their failure to cross-appeal and preserve questions raised by motions for a new trial would be a waiver and/or abandonment of those errors by the Defendants.

The District Court's judgment N.O.V. in Defendants' favor did not state that ruling on motion for a new trial was withheld or to be made only with reverse. The District Court simply entered judgment N.O.V. for Defendants to hold that Defendants are entitled to a ruling for their motion for new trial in the trial court without having cross-appealed as to those errors would enlarge Defendants' right under the judgment since the right to this ruling was not stated or reserved in the judgment by the trial court.

The Court of Appeals for the Seventh Circuit in the case at bar has followed the *Montgomery Ward* case.

**NEW RULE 50(c) SIMPLY REITERATES THE PROCEDURES STATED BY THE MONTGOMERY WARD CASE.**

As previously discussed, new Rule 50(c) simply is a restatement of the procedure set out in the *Montgomery Ward* case, supra; and Petitioners could well have familiarized themselves with proper procedures before this court re-stated it for them.

## THE REASONS GIVEN IN THE OPINION BY THE COURT OF APPEALS FOR DENYING TO PETITIONERS A RULING ON THEIR MOTION FOR A NEW TRIAL ARE SUPPORTED BY THE EVIDENCE.

There is no evidence in the record whatsoever that Petitioners have ever made any effort to have the trial court rule upon or dispose of their motion for new trial. Nor is there any evidence that said motion was called to the attention of Respondent. The only evidence presented of any effort of Petitioners to obtain ruling on the motion for a new trial in the trial court is their Affidavit that they went to the court and failed to find a judge, which fact is attested to by no other person. Their attorneys are familiar with the practice of filing motions so that their requests are of record. In addition, the transcript of record indicates that Appellant filed application for Pauper's Appeal in the District Court on October 24, 1961, and that on October 30, 1961, parties were in court on hearing for Pauper's Appeal and that said cause pended from the day of judgment on October 10, 1961, until February 2, 1962, when transcript of record was filed in the Court of Appeals without Defendants-Petitioners making any request of record for ruling on the motion or the Court of Appeals that the District Court dispose of said motion for new trial.

In addition, the record of this court and the Court of Appeals has not disclosed any cross-appeal by Defendants-Petitioners to preserve errors of trial court which were basis for motion for a new trial not disposed of.

Although it is probable that either party may insist on the ruling on an undisposed of motion, it would not change the principle of law that says a party desiring to preserve the error or substance of a motion filed must

either obtain a ruling on said motion or make reasonable effort to have produced such ruling, or he will be held to waive and/or abandon said motion. Courts proceed by records, and this court may take judicial notice and assume that attorneys for Defendants-Petitioners knew well how to preserve their right to ruling on errors on motion for new trial by making a request of record for ruling on said motion and filing a cross-appeal when plaintiff appealed. Neither procedure was undertaken by Defendants-Petitioners.

Since Petitioners state they went to court to get a ruling on motion for new trial but found the judge gone, why did they not pursue the ruling since they recognized the proper procedure? Respondent submits that Petitioners could have reasoned that if they left it open and the Court of Appeals reversed the District Court judgment N.O.V. in their favor, that they could further delay the ultimate disposition by asking for a ruling on motion for new trial. It is obvious that with a Plaintiff seeking and a Defendant resisting, any delay or ability to create a more expensive, time-consuming procedure is a victory for the Defendant. It would seem that if Petitioners' Affidavit is true, and they sought a ruling and recognized the proper procedure, and if they wanted the motion for new trial ruled upon, they were fully capable of requesting and obtaining a ruling of record from the trial court before appeal. Respondent submits that Petitioners may have considered that the creation of the possibility of a double appeal was to their benefit, and so made no real effort by a request of record for a ruling on their motion for new trial from the trial court.

**THERE WAS ABANDONMENT.**

By reason of the arguments already made by Respondent as to Petitioners' failure to pursue ruling of trial court on motion for a new trial and failure to preserve errors by cross-appeal, there was waiver and abandonment by Petitioners of the ruling on motion for a new trial.

There was also abandonment of right to ruling on the motion for new trial by failure of Petitioners-Appellees to request in their prayer in their Answer Brief in the Court of Appeals that the cause be sent back for ruling on the motion for new trial. (5B C.J.S. Appeal and Error, §1803, p. 98)

**CONCLUSION.**

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

SAUL I. RUMAN,

*Counsel of Record for Respondent Lois Bray Vera Cruz.*

Dated June 5, 1963.

Office-Supreme Court, U.S.
FILED
JUN 17 1963
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962.

No. [redacted] 126

CHESAPEAKE & OHIO RAILWAY COMPANY, AND THE ERIE RAILROAD CO.,

*Petitioners,*

*vs.*

LOIS BRAY VERA CRUZ,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## REPLY BRIEF FOR PETITIONERS.

RUSSEL J. WILDMAN,
1½ South Broadway Street,
Peru, Indiana,
*Counsel of Record for Petitioner Chesapeake & Ohio Railway Company,*

STANLEY A. TWEEDLE,
5217 Hohman Avenue,
Hammond, Indiana,
*Counsel of Record for Petitioner The Erie Railroad Co.*

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962.

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**No. 1094.**

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CHESAPEAKE & OHIO RAILWAY COMPANY, AND THE ERIE RAILROAD CO.,

*Petitioners,*

*vs.*

LOIS BRAY VERA CRUZ,

*Respondent.*

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## PETITIONERS' REPLY TO RESPONDENT'S BRIEF.

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### The Effect of Respondent's Brief Is to Admit That Certiorari Should Be Granted in This Case.

Rule 19 of this Court indicates that the following are the character of reasons to be considered in determining whether certiorari shall be granted:

1. Where the decision of a Court of Appeals is in conflict with the decision of other Courts of Appeals on the same matter.

2. Where a decision of a Court of Appeals is in conflict with applicable decisions of this Court.

3. Where a decision of a Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's general power of supervision.

Petitioners (at page 8 of their petition) contend that the action of the Court of Appeals in directing entry of judgment for Respondent and denying Petitioners a ruling on their timely motion for new trial invokes all three of these reasons for the granting of certiorari here.

Respondent's brief *admits* that grounds 1 and 2, at least, exist. On page 10 of its brief, Respondent says:

> "In the other Court of Appeals and District Court cases, Respondent submits those courts *did not follow the Montgomery Ward case* nor was the issue of waiver, abandonment and failure to cross-appeal decided." (Our emphasis.)

Here is an assertion by Respondent that the cases cited and discussed by Petitioners from the Fourth, Fifth, Sixth, District of Columbia, as well as earlier cases from the Seventh Circuit "did *not* follow the *Montgomery Ward* case" whereas Petitioners assert that they *did*. On this statement alone Respondent has conceded a conflict of decisions and that reasons for a writ of certiorari exist. The uncertainties created by the decision in the case at bar as opposed to the decisions from other Courts of Appeals (*all professing to construe Montgomery Ward & Co.* v. *Duncan*) make it vital that certiorari be granted so that attorneys relying on these decisions, be advised.

Furthermore, Respondent, at page 9 of its brief, says:

> "The decision of the Court of Appeals for the Seventh Circuit in this case at bar *follows* the *Montgomery Ward* case * * *" (Our emphasis.)

whereas Petitioners contend that it *departs* from *Montgomery Ward*. Here again is an admitted conflict as to the true meaning of *Montgomery Ward*. If opposing counsel each draw diametrically opposite conclusions from the *same case* it would seem that only certiorari can provide the correct answer.

We again point out that such a conflict of construction was the very reason for the original grant of certiorari in *Montgomery Ward*. At page 247 of that case this Court stated:

> "The importance of a decision by this Court *respecting the proper practice under Rule 50(b)* and a *conflict of decisions* moved us to *grant certiorari*." (Our emphasis.)

The opinion of the Court of Appeals for the Seventh Circuit, in the case at bar bypasses this proper practice under Rule 50(b) by resort to an erroneous concept of *Montgomery Ward*. Hence certiorari and further elaboration of that case is here necessary.

## Petitioners' Cited Cases Did Consider and Did Decide That There Was No Waiver or Abandonment.

Respondent, while stating (page 10) that the cases cited by Petitioners are *contrary* to *Montgomery Ward*, nevertheless attempts to distinguish them from the Seventh Circuit case at bar by saying that they did *not* decide the issue of waiver or abandonment. This is simply not true. In the following cases waiver and or abandonment of the motion for new trial *was* decided and was decided *against* this fictional theory:

> "We are, however, unable to spell out any such election or withdrawal."
>
> *Montgomery Ward & Co.* v. *Duncan* (1940), 311 U. S. 243, 249, 85 L. ed. 147, 61 Sup. Ct. 189.

The motion for new trial had *not* automatically "passed out of the case".

> *Casper* v. *Barber & Ross Company* (D. C. 1961), 288 Fed. 2d 379, 383.

Failure to rule on a motion for new trial "does not bar further consideration of such motion".

*Atkins* v. *Halliburton Oil Well Cementing Company, et al* (5 Cir. 1952), 196 Fed. 2d 876, 878.

Where the court below took no action on the alternative motion for new trial, "it stands undisposed of".

*Banks* v. *Associated Indemnity Corporation, et al* (5 Cir. 1947), 161 Fed. 2d 305, 314.

"New trials are not abridged or disfavored by the new rules."

*Pruitt, et al* v. *Hardware Dealers Mutual Fire Insurance Co., Stevens Point, Wisconsin* (5 Cir. 1940), 112 Fed. 2d 140, 143.

If, as Respondent states, these cases are contrary to *Montgomery Ward*, then once again there is reason for the granting of the writ.

## There Was No Abandonment or Opportunity for Cross-Appeal.

Respondent has asserted several times (pages 9, 11) that the Court of Appeals for the Seventh Circuit *found* that there was waiver and or abandonment of the motion for new trial. Respondent takes too much liberty with that Court's opinion. Following is the Court's language:

> "On this record the District Court might with justification have assumed that Appellees had abandoned the motion." (Appendix P. 7a.)

By what logic or mental process can Respondent twist this statement into a "finding" of abandonment by the Court of Appeals? Nor did the District Court "find" abandonment. There is nothing in the record of this case to indicate that the District Court *even contemplated* that Pe-

titioners had abandoned the motion. The record is all to the contrary. No one knows why Judge Swygert failed to rule on the motion for new trial, but it is likely that in the excitement and press of business surrounding his elevation to the Court of Appeals the following day, he merely overlooked it. However, in view of the conceded facts that Petitioners filed it, briefed it, and only seven days earlier had argued it to him at length (Appendix P. 10a), *it can in no event be said that they abandoned it.*

Respondent has likewise taken further liberties with the Court of Appeals' opinion by asserting (P. 11) that the Court "also found" that Petitioners failed to raise the matter of the motion for new trial by cross-appeal. We submit categorically that the opinion of the Court of Appeals does not even mention the matter of cross-appeal. Further, Petitioners were in no position to preserve errors by way of cross-appeal until their motion for new trial was *adversely* ruled upon.

The suggestion of Respondent that the remaining District Court Judge (Grant) could have ruled on the motion is unrealistic because it is conceded (Respondent's Brief P. 4) that the transcript of testimony and proceedings, including the trial court's instructions and comments, were not written up by the court reporter until almost four months after the date of the judgment n.o.v. Immediately upon receiving this transcript Respondents filed it in the Court of Appeals on February 2, 1961. In the interim period between judgment n.o.v. and completion of the transcript of evidence and proceedings Judge Grant (a complete stranger to the evidence and trial proceedings) could hardly have made an intelligent ruling on the motion for new trial.

Likewise the suggestion of Respondent that Petitioners should have asked the Court of Appeals to confer with the newly elevated Circuit Court Judge Swygert and then rule

on the motion is easy to make in retrospect, but it is likewise unrealistic. Furthermore, there is no legal authority which would enable a Court of Appeals to grant or deny a motion for new trial.

## CONCLUSION.

This case is before this Court only because of a unique series of events, most of which occurred outside the courtroom and over which Petitioners had no responsibility or control. A District Court Trial judge is elevated to the Circuit Court of Appeals. Among the many matters to be disposed of before he leaves is Petitioners' motion for judgment n.o.v. and motion for new trial in the alternative. In the rush of clean-up he was obliged to cut oral argument short (Appendix, P. 10a). Thereafter he had left but four days in which to write an opinion and to take care of the myriad of other judicial and administrative matters which were undoubtedly crowding upon his time and thinking. In a well written opinion granting Petitioners judgment n.o.v. (Appendix, P. 1a) he *overlooked* disposing of the motion for new trial in the alternative. Petitioners' substantial legal rights raised by that motion were thus bypassed *under circumstances over which they had no control.* Upon receiving the opinion by mail Petitioners *immediately* attempted to correct the omission but the Judge had permanently left the jurisdiction. The Court of Appeals, in reversing the judgment n.o.v., is also attempting to put an end to the entire litigation by final judgment. *But this shortcut punishes innocent litigants by depriving Petitioners of vital legal rights timely raised and vigorously pursued.* No amount of legal sophistry can justify this deprivation of due process to Petitioners who were in no way responsible for the unusual chain of events above re-

lated. It is left for this Court to give Petitioners their full day in court. It is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Dated June 14, 1963.

RUSSEL J. WILDMAN,
1½ South Broadway Street,
Peru, Indiana,
*Counsel of Record for Petitioner Chesapeake & Ohio Railway Company,*

STANLEY A. TWEEDLE,
5217 Hohman Avenue,
Hammond, Indiana,
*Counsel of Record for Petitioner The Erie Railroad Co.*